U.S. Generating Company *and* Local 464, Utility Workers Union of America, AFL-CIO. Case 1–CA–36858

May 28, 2004

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS SCHAUMBER AND MEISBURG

On August 30, 2001, Administrative Law Judge Wallace H. Nations issued the attached decision. The Charging Party filed exceptions and a supporting brief,[1] and the Respondent filed an answering brief to the Charging Party's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and the complaint is dismissed.

[1] The Charging Party also filed a motion to strike, urging the Board to strike as untimely arguments included in the Respondent's answering brief that the Charging Party contends should have been raised as exceptions. The Charging Party's motion interprets the judge's finding that the Respondent had *modified* its *Burns* rights in agreeing to the asset purchase agreement, as a finding that the Respondent had *waived* its *Burns* rights to establish initial terms and conditions of employment. See *NLRB v. Burns Security Services*, 406 U.S. 272 (1972) (A successor employer is ordinarily free to set initial terms on which it will hire employees of a predecessor without first bargaining with the employees' representative.). Therefore, according to the Charging Party, the Respondent's position in its answering brief that it was a *Burns* successor is effectively an exception to an adverse finding. However, as the Respondent noted in its opposition to the motion to strike, none of the judge's findings were adverse to the Respondent. The judge found no violation, and affirmatively found that the Respondent retained certain successor rights under *Burns*. Accordingly, we deny the Charging Party's motion to strike.

Dated, Washington, D.C. May 28, 2004

Robert J. Battista,	Chairman
Peter C. Schaumber,	Member
Ronald Meisburg,	Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Michael T. Fitzsimmons, Esq., for the General Counsel.
James W. Bucking, Esq. and *Arthur Telegen, Esq.*, of Boston, Massachusetts, for the Respondent.
Stephen R. Domesick, Esq., of Boston, Massachusetts, for the Charging Party.

DECISION

STATEMENT OF THE CASE

WALLACE H. NATIONS, Administrative Law Judge. This case was tried in Boston, Massachusetts, on June 20–22, 2000. The charge was filed by Local 464, Utility Workers Union of America, AFL–CIO (Union) on December 15, 1998. The complaint was issued December 30, 1999, and U.S. Generating Company (USGen or Respondent) filed a timely answer on January 12, 2000. On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs and reply briefs filed by the parties, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation, generates electricity at its facility so-called Brayton Point facility in Somerset, Massachusetts. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background and Issues for Determination

For over 30 years, the Union represented a unit of approximately 150 employees employed by New England Power Company, (NEP) a subsidiary of New England Electric System, at that employer's Brayton Point generating plant located in Somerset, Massachusetts. The Union and Locals 446 and 454 of the Utility Workers of America, AFL–CIO were parties to a multiunion, multilocation unit consisting of three generating plants, one represented by each Local. These parties entered into a collective-bargaining agreement covering the three facilities that was effective by its terms from May 21, 1995, through May 20, 1999. In addition, each local union was also a party to separate local agreements. These local agreements were effective for the duration of the overall collective-bargaining agreement.

On June 17, 1997, the Union, Locals 440 and 454, and Locals 326 and 486 of the International Brotherhood of Electrical Workers, AFL–CIO entered into a memorandum of understanding (MOU) with NEP and three other subsidiaries of New England Electric System. The MOU dealt with the anticipated sale of the assets of these companies to another employer and the effect of this transfer on employees in the various units. The MOU provided that if New England Electric System sold its assets to a successor employer, it would require the successor, as part of the purchase and sales agreement, to agree to recognize the various unions and maintain the overall agreement for its duration, except that it could substitute its own benefits for existing benefits provided they were equivalent to those which existed under the predecessor. The successor was not required to maintain the terms of the local agreements, but was required to bargain over them.

An asset purchase agreement (APA) was entered into on August 5, 1997, by NEP and the Respondent. The asset purchase agreement requires the Respondent to abide by the terms of the MOU. Pursuant to the APA, Respondent did purchase the assets of NEP. The complaint raises the following issues as a result of Respondent's actions and responsibilities following the purchase:

> 1. Did the Respondent assume the collective-bargaining agreement between its predecessor, New England Power Company, and the Union?
>
> 2. Did the Respondent violate Section 8(a)(5) and (1) of the Act when it unilaterally modified the collective-bargaining agreement between it and the Union by implementing a management rights clause under the quise of a work rule?
>
> 3. Did the Respondent violate Section 8(a)(5) and (1) of the Act when it unilaterally modified the collective-bargaining agreement between it and the Union by discontinuing a defined benefit pension plan and replacing it with a defined contribution plan?

B. Relevant Facts Relating to the Issues

1. Contractual framework and terms of the MOU

The MOU provided for obligations imposed directly on NEP (e.g., early retirement and severance obligations), and defined obligations which NEP and the unions agreed NEP would impose on the as-yet unidentified buyer (e.g., recognition of the union, hiring of employees, adherence to some collective bargaining terms). The "Buyer" was not to be a party to the MOU, but NEP was to require the "Buyer" to satisfy the obligations set out in the MOU.

A key point to note here is that Local 464 and NEP wrote out a blueprint for the buyer to read and follow. They could have been as explicit as they chose to be. To the extent they drafted ambiguously, they had to have known that they risked a buyer's adopting a permissible, if not necessary, reading of the MOU.

In the summer of 1997, USGen became the "Buyer" identified in the MOU. On August 5, 1997, USGen executed an asset purchase agreement (APA) with NEP to purchase several power plants and related assets. Among the plants USGen agreed to purchase from NEP was Brayton. As USGen was not a party to the MOU, neither Local 464 nor the IBEW locals was a party to the APA. Indeed, the MOU had provided that "the Unions may review the text of [relevant] sections of the asset purchase agreement, but the Unions acknowledge that they have no right to negotiate such text with [NEP] and/or the new owner."

The APA contained specific commitments USGen made to NEP concerning the unionized employees at these plants. Namely:

> a. USGen (the Buyer) could offer employment to NEP power plant (Fossil Assets) employees "effective as of the Closing Date."
>
> b. "[O]n the Closing Date, [USGen] will assume the Main Table Agreements as they relate to IBEW/UWUA Employees to be employed at the [power plants] and comply with all applicable obligations thereunder and will accept and fulfill all obligations under the IBEW/UWUA MOU that are designated for the new owner, including but not limited to the obligation of the new owner to recognize the respective union as the collective bargaining agent."
>
> c. There exist between NEP and the unions "Local Working Conditions," which "are comprised of local agreements, copies of which [USGen] hereby acknowledges that it has had the opportunity to review, and local past practices." "Pursuant to the IBEW/UWUA MOU, [USGen] shall not be required to assume any Local Working Conditions but agrees that it shall fulfill all of its obligations under the IBEW/UWUA MOU with respect to the creation of, and bargaining over, new Local Working Conditions."
>
> d. There is a precise listing of the documents which comprise the "Main Table Agreements." The only Main Table Agreement concerning Local 464 is the "May 21, 1995 to May 20, 1999 Agreement as to Wages, Working Conditions and Seniority between Massachusetts Electric Company, New England Power Company and Local Union Nos. 446, 454, 464, Utility Workers Union of America, AFL–CIO." This is the "Red Book," Thus USGen became obligated to NEP, to fulfill the Buyer's obligations set out in the MOU. As is relevant to this case, the MOU says:
>
> > a. "The MOU supersedes all prior agreements between the parties to the extent necessary to carry out its terms."
> >
> > b. "Implementation of the terms under Article IV of this MOU is contingent only upon the change in ownership of [NEP's] generation assets."
> >
> > c. "[NEP] will require [USGen] to assume the 'main table' collective bargaining agreements to the extent applicable to those assets of the generation business that are being transferred to the new owner." In the case of Brayton, the main table agreement was identified as the "May 21, 1995 - May 20, 1999 Agreement as to Wages, Working Conditions and Seniority Between Massachusetts Electric Company, New England Power Company and Local Union Nos. 446, 454, 464 Utility Workers

Union of America, AFL–CIO (red-covered book)." This is the "Red Book."

d. NEP "will require the new owner to offer all rostered positions it intends to fill to existing rostered employees first."

e. USGen "will be required to recognize the Unions . . . as of the change in ownership."

f. "With regard to the assumption of any 'main table' collective bargaining agreement, the new owner shall have the right to use different providers and to either establish its own benefit plans or utilize its existing benefit plans to provide employees who become employed by the new owner with a level of benefits equivalent to the level of benefits set forth in the applicable 'main table' collective bargaining agreement. For purposes of benefit accruals, service time with the NEES companies shall be recognized, but the ultimate benefits provided shall be offset by those already provided by [NEP] or committed to be provided by [NEP] in the future. Consequently, under no circumstances shall the new owner be obligated to provide those employees with benefits which, collectively with benefits being provided by the Company, would be greater than those benefits the employees would have been entitled to under the 'main table' collective bargaining agreement had the employees remained employed by [NEP] for the applicable period of employment with the new owner."

g. [NEP] "will not require a new owner to assume any other agreements, including but not limited to local agreements and local past practices, existing between [NEP] and any Local (together referred to as 'Local Working Conditions'). . . . Instead, [NEP] will encourage the new owner to initiate bargaining with the applicable Local over Local Working Conditions prior to the change in ownership. In the event this does not occur, or does occur and no agreement is reached, the new owner will be required to provide the Local with the initial Local Working Conditions that are to be effective upon the change in ownership prior thereto. In the event the new owner's initial Local Working Conditions are to be effective upon change in ownership, the new owner will be required to commence negotiation of them after the change in ownership upon the Local's request and bargain until reaching agreement or impasse." Thus, USGen had an agreement with NEP (the APA) which Local 464 was not a party to, and NEP had an agreement with Local 464 (the MOU) which USGen was not a party to; there was no agreement between USGen and Local 464.

2. NEP's work rules and benefits

a. Work rules

As described above, the APA/MOU provided that USGen was not obligated after closing to assume any agreement other than the applicable portions of the red book. Moreover, as also described above, the APA/MOU explicitly stated that after closing USGen was not obligated to assume the only two other sources of agreements between the Union and NEP at Brayton: "local agreements" and "local past practices." Together, these local agreements and local past practices comprised NEP's "local working conditions," or what the parties have referred to as "local work rules." There was no evidence in the record of the existence of any other kind of agreement between NEP and the Union. Although the Union suggested that there were some in-between kinds of agreements—not quite in the red book, but also not "local"—no such thing surfaced at trial. In fact, the evidence was to the contrary. Barry Ketschke, who ran Brayton both under NEP's ownership and USGen's ownership, testified that other than the red book itself, everything else was local. There was no interchange between Brayton and the two other NEP businesses who were bound by the red book.[1] There were no joint grievances or arbitrations. Finally, any meaning or interpretation of red book language derived through grievances, arbitrations or other local processes was binding locally only, and was not applicable to the other union signatories to the red book.

There was good reason for NEP to resist imposing these local arrangements on a buyer. While keeping the red book would insure maintaining basic terms and conditions of employment, NEP's local agreements with Local 464 comprised hundreds of pages and covered the gamut of topics. First, there was the so-called "Black Book" of local agreements, 125 pages in itself. The black book included such subjects as new employee selection/qualification, promotion/progression, filling of vacancies, transfers, demotion/discipline, job assignments, overtime assignments, maintaining efficiency, staffing levels, shift complements, classification complements, layoffs/reductions in force and staggered employment. In addition, Ketschke was able to compile another 130 pages of NEP-Local 464 local agreements covering a similar range of topics, including disciplinary matters and a very detailed layoff agreement. Finally, there were other written local agreements that remained in NEP's possession after closing. Also, numerous past practices developed between NEP and Local 464 during the Union's approximately 30 years representing employees at Brayton. Indeed, it was a regular occurrence when NEP owned Brayton for Local 464 to claim the existence of an old past practice of which current management was unaware. Once having secured for the employees the red book, it was sensible otherwise to wipe the slate clean.

b. Benefits

Local 464 had agreed with NEP that the buyer, USGen, would have the right to utilize its existing benefit plans to provide employees with a level of benefits equivalent to the level of benefits set forth in the red book, offset by those benefits already provided by NEP or committed to be provided by NEP in the future.

With regard to retirement benefits, NEP had two different plans. First, it had a 401(k) or "thrift" plan whereby NEP made payments based on contributions made by the employee. Sec-

[1] These were retail locations, not power plants, and were not part of USGen's acquisition.

ond, NEP had a final average pay pension plan, a defined benefit program whereby employees would receive annuity payments on retirement depending on a formula and certain options chosen by the employee.

NEP's defined benefit plan had multiple components and contingencies; it was not the one-size-fits-all, "guaranteed" pension payment portrayed by the General Counsel and the Union. There are "various alternatives" within the plan altering an employee's annuity payment based on spousal benefit options. Benefits may also be reduced if a participant dies or if his/her employment ends prior to age 55. The plan also has provisions for vested benefits being paid in a lump sum. In all of these cases, benefits are determined based on the "Actuarial Equivalent Factor" or the "actuarially equivalent value" determined by an enrolled actuary having met the requirements of the joint board for the enrollment of actuaries.[2] As for the solvency of the plan, NEP's contributions were also made based on actuarial estimates. By law, NEP would *not* be obligated to cover the totality of any investment shortfall in the event of insolvency. Nor would the pension benefit guaranty corporation cover the entire deficit. ("The PBGC does not, however, guarantee all types of benefits under covered plans, and the amount of the benefit protection is subject to certain limitations. . . . Additionally, there is a ceiling on the amount of monthly benefit that PBGC guarantees").

Because of the offset provision in the APA/MOU, USGen's obligation after closing for the remaining term of the red book was to provide a retirement benefit of less than half the value of the benefit NEP provided. NEP's plan year ran from April 1 through March 31. Employees were credited with a full year of service when they accumulated 1000 hours of service within the plan year. Employees were credited with 190 hours of service for each month in which they worked at least 1 hour. Id. Prorated years of service could be determined by dividing the number of credited hours by 1000. Id. So, for the 5 months between April 1, 1998, and August 31, 1998, NEP's last day owning Brayton, each employee accumulated 190 hours per month, or 950 hours total. Dividing 950 by 1000 yields 95 percent. This meant there was only 5 percent of the plan year (April 1–March 31) benefit not paid by NEP. Id. Within the duration of the red book, which expired on May 20, 1999, there remained 2 months into the next plan year (April and May 1999), which would be 380 hours out of 1000, or 38 percent. Thus, beginning with USGen's ownership of Brayton on September 1, 1998, and ending with the red book's expiration on May 20, 1999, all but 43 percent of an employee's expected pension credit for that period was already covered by NEP.

3. USGen's development of work rules and benefits

USGen understood its promise to NEP, as reflected in the APA, which incorporated obligations contained in the MOU jointly drafted by NEP and Local 464, to have these central components:

> Assume "applicable" portions of the main table collective bargaining agreements, which in the case of Brayton meant the Red Book. Excluded from this obligation were those provisions of the Red Book relating to benefits.
>
> With regard to benefits, utilize its existing plans or create new plans to provide employees with a level of benefits equivalent to the level of benefits contained in the Red Book.
>
> With regard to local working conditions, bargain with the Union before and/or after closing, with the right to implement unilaterally at closing if no agreement were reached, giving notice thereof to the Union.

Neither the General Counsel nor the Union introduced any document into the record that purports to explain, limit or vary the language in the APA/MOU. USGen received no such document from NEP. Nor did the General Counsel or Union call any witness from NEP, Local 464 or either of the IBEW local unions who were party to the MOU to testify that the APA/MOU language does not mean what it says.

After USGen and NEP executed the APA in August 1997, USGen's vice president in charge of the acquisition, Ernie Hauser, began meeting with local and national officials of the unions which represented NEP employees at the generation facilities USGen would be purchasing. Hauser's first meeting with UWUA officials occurred in September 1997. Hauser also met several times with Local 464 representatives. At each of these meetings, Hauser emphasized three points germane to the instant proceeding: (1) USGen would honor its obligation to assume applicable portions of the red book; (2) USGen's existing benefit package used defined contribution plans to provide pension benefits to employees, not any defined benefit plan, and that these benefits were the same for every single employee in the Company; and (3) that USGen ran its plants with flexible, management rights-oriented work rules.

USGen was guided by these principles when it began formulating its local work rules and preparing for negotiations. Hauser instructed USGen's Director of Labor Relations Fred Barall, to consider two things when drafting the Company's initial proposed work rules: USGen's business philosophy, and the requirements of the APA.

With respect to work rules, USGen was intent on getting the benefit of its bargain: namely, fully exploiting the strong language in the APA/MOU stating that NEP's work rules would not be binding on USGen after closing, and giving USGen the right to promulgate its own local rules. This was of critical importance to USGen. NEP and Local 464 had a long, document-heavy bargaining history which USGen knew about, and USGen suspected that there might be many other local rules written and unwritten that it did not know about.[3] These rules, covering topics such as minimum staffing levels, shift complements, jurisdictional limitations and job progression, micromanaged the employment relationship, directly contrary to USGen's operational philosophy. USGen believed there was value in having its work rules restate in plain English that NEP's rules had disappeared and in their place were USGen's

[2] Bob Vogrich is an enrolled actuary having met the requirements of the joint board for the enrollment of actuaries.

[3] Indeed, in an unrelated arbitration proceeding after closing, Local 464 produced a local agreement between it and NEP that the Union claimed was controlling with regard to a reduction in force: an agreement USGen had never seen.

management rights oriented local rules, rather than merely relying on the legalistic wording in the APA/MOU.

Consistent with Hauser's instructions, Barall drafted local work rules that reiterated the APA/MOU requirements and emphasized USGen's flexible work philosophy. In USGen's first proposed set of work rules, work rule 1 (as well as work rules 2–4) asserted the rights accorded the buyer by the MOU, by spelling out a statement of management flexibility free from any restraints other than those set forth in the main table collective bargaining agreement (the red book). Draft work rule 1 stated as follows: "Except as limited by an express provision of the collective bargaining agreement, the Company shall have exclusive control and discretion to manage the plant and the business, and to direct the workforce, including . . . ." USGen included the introductory clause, "Except as limited by an express provision of the collective bargaining agreement," to make clear to the Union that management flexibility would in no event infringe on rights contained in the red book. As such, work rule 1 mirrored the MOU: it accepted the red book, but rejected NEP's local rules and practices.

As to benefits, USGen understood the APA/MOU to allow it to implement its existing benefit designs so long as the level of benefits was equivalent to NEP's. USGen's existing benefits not only were excellent, but were identical across the board from the CEO to the janitors. Consequently, subject to confirmation that the level of its benefit plans provided a "level of benefits equivalent" to NEP's, USGen intended to implement its existing benefit plans at Brayton after closing. Optimistic that its plans would prove to be equivalent in value to NEP's, USGen put together its plan information for presentation to the Union. At the same time, USGen hired Hewitt Associates, an actuarial firm, to perform an equivalency analysis.

4. Preclosing negotiations

Although the APA/MOU did not obligate USGen to meet with Local 464, even a single time, before closing, USGen held thirteen (13) bargaining sessions with the Union between May 20, 1998, and August 26, 1998.[4] Since it would not assume ownership until September 1, 1998, USGen did not employ a single person at any of the to-be-purchased facilities throughout these discussions.

At the outset of the first meeting on May 20, Hauser reiterated what he had been saying since the APA was signed almost one year earlier: that USGen would be proposing a management rights oriented set of work rules, and a benefits package with defined contribution and not defined benefit pension plans. Barall stated USGen's position (1) that the APA/MOU required it to adopt applicable portions of the red book, and it would do so; (2) that the APA/MOU did not require USGen to adopt NEP's local work rules, and it would not do so, but instead would be giving the Union new local working conditions for its review, discussion and input; and (3) that USGen recognized the APA/MOU's equivalency requirement, and would provide a full review of USGen's existing benefits plan which it expected would "look very much like" the design of the benefits implemented at closing.

a. Work rules

Barall explained to Local 464 at the May 20 meeting USGen's rationale, as described above, for drafting its work rules—and in particular, work rule 1—as it did. Namely, Barall explained USGen's understanding of the APA/MOU's requirements (NEP's rules go away, USGen has the right to issue new rules); how its other facilities operate (flexible, management rights oriented work rules); and USGen's concern that it be clear that there would be a "clean slate" at closing, i.e., that other than the red book, no part of NEP's "long complicated history" with Local 464 would apply to USGen. When the Union claimed that it read USGen's initial work rules as contrary to the requirements of the red book and hence the MOU, Barall assured the Union that they should not be read that way but instead, the work rules "restate our rights under the MOU." According to Barall, it became apparent, however, that the Union's agenda was not to protect its rights under the red book, but to assert additional rights relating to the "meaning and the application and the interpretation" of the red book. Barall objected that the terms—"meaning," "application" and "interpretation" of the red book were simply euphemisms for "local working conditions" that the MOU made clear would not survive closing. Thus, when the Union claimed that the so-called management rights clause of work rule 1 was a "Red Book item," USGen replied that it was not, that there was no management rights clause in the red book. Thus, almost immediately the parties' positions set out here were established: USGen proposed a rule which mirrored the Buyer's rights under the MOU, and in the opinion of USGen, the Union attempted to compromise what it had drafted into the MOU.

At the parties' June 17, 1998 meeting, the Union reiterated its belief that the APA/MOU required USGen to assume not just the red book, but also the "meaning, the application [and] the interpretation" of the red book. Specifically, the Union stated that "all of the past practices" from the red book were binding on USGen. USGen again disputed these positions based upon the explicit language in the APA/MOU. Moreover. USGen stated that a work rule like its work rule 1 was needed to prevent the NEP local work rules from "converting" into USGen work rules at closing based upon some type of waiver or inaction. Nonetheless, USGen invited the Union to give it a specific example where work rule 1 conflicted with the red book, but the Union was unable to do so. Also at this meeting, the Union stated twice that it did not object to a "management rights clause" per se appearing in the work rules.[5]

When the parties met on August 11, 1998, the Union proposed a new work rule 1, a so-called "management rights clause." The Company responded favorably to the proposal, describing just two minor adjustments that needed to be made. The Union stated that the two areas of clarification "sound like reasonable points."

At the parties' next meeting 2 days later, on August 13, 1998, the Company scrapped its work rule 1 in favor of the

[4] The APA/MOU called for *no* negotiations over benefits, and urged (but did not require) preclosing bargaining over local work rules.

[5] The Union repeated the point at the parties' July 21, 1998 meeting.

Union's August 11 proposal. USGen distributed a revised set of work rules substituting the Union's proposed work rule 1 for its own, with only the two minor changes raised orally on August 11. At this meeting, the Union pressed USGen to eliminate work rules other than work rule 1, a point the Union had previously raised on August 11, suggesting that such work rules were repetitive of work rule 1. USGen verbally agreed to eliminate work rule 5 but move the core language ("to determine overall staffing levels, shift complements and classification complements") to work rule 1, a change reduced to writing at the next meeting.

Despite the seeming resolution of the work rules based on USGen's adoption of the Union's verbiage, at the parties' next meeting on August 21, 1998, the Union sought a return of the black book, NEP's hundred-plus page volume of local rules. The Union took similarly regressive steps at the parties' August 25, 1998 meeting. Rationalizing its repudiation of the progress the parties had made, the Union later asserted that its International Representative (Jack Holland), who was the lead negotiator when the Union proposed the new work rule 1 at the August 11 meeting, had apparently misrepresented his authority to make such a proposal.

The parties' last meeting before closing occurred on August 26, 1998. When the Union made it clear that there would be no agreement with USGen, USGen stated its intention to exercise its rights, granted by *Burns*[6] and preserved by the APA and the MOU, to implement work rules effective at closing consistent with its obligations under the APA/MOU.

b. Benefits

When the Company raised the issue of benefits at the initial meeting on May 20, the Union stated twice that it wanted to bargain the issue jointly with the IBEW, with whom it had negotiated the MOU's benefits language.

USGen made a lengthy benefits' presentation to the Union at the parties' June 3, 1998 meeting. The Company's Benefits Manager Darlene Dunlop attended the meeting and showed slides on USGen's existing benefits package, including its pension plans. The Union stated that it did not intend to argue that USGen's pension plan needed to have the same design as NEP's, but the Union would want to see actuarial calculations demonstrating equivalence. The Union stated that "clearly" retirement was a benefit for which USGen could implement an alternate (to NEP's), equivalent plan. The Union further stated that it did not intend to object to the equivalency issue regarding USGen's defined contribution plan. The Union distinguished retirement plans from areas such as sickness, vacation and holidays, which the Union believed must be implemented exactly as NEP had them. This was a distinction the Union drew throughout the parties' negotiations. The Union requested documentation concerning the Company's position that its benefits were equivalent in value to NEP's. The Union also requested a series of documents concerning USGen's benefit plans, which the Company provided at the next meeting.

At the parties' June 17, 1998 meeting, the Union repeated its position that the retirement plan could be different if equivalent, and asked if the Company had finished its equivalency analysis. USGen responded that it expected the analysis would be completed shortly.

USGen presented the Union with the written equivalency analysis at the next meeting, on June 30, 1998. After introductory passages that explain its methodology, the written report concludes that USGen's benefit plans, as a package, provide employees with greater value than NEP's, and specifically with regard to retirement, USGen's plans exceed NEP's in value. The Union did not take issue with the conclusions reached in this report concerning the retirement plans. The only concern raised by the Union was whether, despite overall equivalence, there might be a limited group of employees relatively close to retirement age for whom NEP's plan would be preferable.[7]

When the parties met on July 21, 1998, the Union explicitly authorized USGen to implement its retirement plans at closing. Seemingly satisfied that the Hewitt analysis confirmed USGen's compliance with the APA/MOU's equivalency standard, the Union (by its chief negotiator and attorney, Stephen Domesick) told the Company to "go ahead" with its retirement plans. As it had done earlier, the Union distinguished the retirement plans (and the medical plans) from a number of other benefits (e.g., vacations, sick leave, holidays) the Union believed were not subject to the equivalency analysis and must instead be implemented precisely as NEP had them. The Union asserted that ERISA-governed plans (medical and retirement) were the only benefits for which the MOU's equivalency standard applied.

Also at this meeting, the Company addressed the concern the Union had raised at the prior meeting regarding certain NEP employees who were relatively close to retirement and therefore might prefer a defined benefit pension plan. In response to the Union's inquiry, USGen had hired another actuarial firm, Towers Perrin, to analyze the effect on employees of various ages and years of service switching mid-career from NEP to USGen and therefore leaving a defined benefit retirement plan for a defined contribution retirement plan. Towers Perrin produced a series of charts showing that for all age/service categories, even these employees whom the Union was concerned about would receive a more valuable pension from USGen than if they had remained in NEP's retirement plans. USGen offered to have the Towers Perrin actuary who performed these analyses, Deb DuBois, attend a meeting with Local 464, but the Union declined. The Union said that instead, it would prefer to have its actuary contact DuBois to discuss and ask questions about her analysis. USGen gave the Union DuBois' telephone number, but the Union actuary never called her.

At the parties' August 21, 1998 meeting, the Company explained the investment options available to employees under USGen's retirement plans. The Company told the Union that there were "income funds" providing conservative investment vehicles for employees who wanted to avoid high risk.

In response to the administrative law judge's question, Barall testified that at no time during the parties' negotiations between

[6] *NLRB v. Burns Security Services*, 406 U.S. 272 (1972).

[7] No Brayton employee hired by USGen at closing was truly close to retiring, because everyone who would have been in that category took advantage of the retirement package NEP offered in the MOU.

May 20, 1998, and closing, did the Union claim that USGen was forbidden from implementing its retirement plans rather than a defined benefit pension plan.

c. The Union's efforts to establish a legal relationship with USGen

At the June 30 meeting, the Union acknowledged that it had no existing legal relationship with USGen and attempted to do something about it. The Union asked if USGen was willing to sign an agreement recognizing Local 464 and agreeing to assume the red book. The Company said it would review the request with its attorneys, but was disinclined to vary the procedure set forth in the APA/MOU. The Union asked if USGen had at that time assumed the red book, and the Company responded that it would only do so at closing. The Union stated its belief that it had the right to sue NEP, and that "perhaps" there was a way to sue USGen also. When the Union accused USGen of acting illegally, the Company responded, "we don't even own the facility, so how can we be acting illegally. We were there voluntarily bargaining."

At the parties' July 21 meeting, the Union handed USGen a proposed two-part handwritten agreement concerning USGen's recognition of Local 464 and its assumption of the red book. The signatories to the agreement would have been USGen and Local 464. Substantively, the agreement would have made USGen's recognition of the Union and assumption of the red book "[e]ffective on and after the Closing Date." The Company did not sign the agreement.

The Union made another attempt to establish privity with USGen the following day, at the parties' July 22, 1998 meeting. The Union asked if USGen would sign the recognition/assumption agreement presented the day before. The Company refused, stating that the APA/MOU provided the procedures for those events (union recognition, contract assumption) to occur at closing. Based on the Company's position, the Union stated that it was no longer interested in meeting. In fact, the Union read a speech attributing its refusal to continue meeting to "the Co's present unwillingness to recognize Local 464 as of the closing date and to agree with Local 464 to assume all of the applicable obligations under the MTA."

Through to the end of the negotiations, the Union tried to change the status of the relationship between it and USGen. It again asked, on August 21, for USGen to sign recognition and assumption agreements. This time, there were two agreements, rather than one, and they were typewritten, not handwritten. The content, however, had not changed, and USGen rejected them for the same reasons it had done earlier. At the parties' next meeting, on August 25, 1998, the Union complained that USGen's refusal to sign the recognition and assumption agreements meant that Local 464 had "no status" and was "not sure why they were here."

5. Notice of implementation of terms and conditions of employment

For both work rules and retirement benefits, the Company informed Local 464 in writing *before* closing, in August 1998, what it would be implementing immediately at closing, at 12:00:01 on September 1, 1998, and that is precisely what USGen did implement. There is no claim in this proceeding that after closing, USGen made any changes to the terms and conditions of employment it implemented at closing, except by agreement with Local 464.

Throughout the bargaining process, and in particular at the parties' last two meetings, USGen informed the Union that without an agreement between them, the Company would implement work rules and benefits in accordance with its obligations to NEP as described in the APA/MOU. When the Union ended the final meeting on August 26 by saying that it would not reach an agreement as USGen had proposed, the Company responded that it would advise the Union of its implementation plans. By letter dated August 27, 1998, USGen informed the Union of the benefits package it would implement at closing, including the two aspects of the Company's pension program, the U.S. Generating Money Purchase Pension Plan and the U.S. Generating 401(k) Plan. By letter dated August 28, 1998, USGen informed the Union of the work rules it would implement at closing, including work rule 1. And on August 31, 1998, USGen hand-delivered to the Union a complete package of the terms and conditions of employment that would apply at and after closing, including benefits and work rules.

6. The status of negotiations on the eve of closing

Thus, on the eve of closing, when finally USGen would employ the Brayton employees and recognize Local 464 as the bargaining agent of its employees, there was absolutely no ambiguity about the issues presented here:

> a. USGen was to implement its own benefit plans, which a actuarial firm had opined provided an "equivalent level of benefits" to NEP's plans, and Local 464, which had participated in the drafting of the MOU, agreed that USGen had satisfied this obligation under the MOU.
>
> b. USGen was to implement its work rule 1, in substance proposed by Local 464, which was intended to reflect exactly what the MOU had expressed: USGen would be bound by the provisions of the red book, but not by other undertakings between NEP and Local 464. USGen was implementing its own rule of management flexibility, but stood ready to (and did) continue negotiations over work rules with Local 464, mirroring the circumstances set out in the MOU.

7. Implementation of terms and conditions of employment

a. Pension benefits

Effective at the closing of its purchase of Brayton from NEP, USGen implemented the identical retirement plans that were in effect for every single one of its existing employees. USGen implemented the same pension plans at all of the other facilities it purchased from NEP: Salem Harbor Station (represented by IBEW Local 326), Manchester Street Station (represented by the BUW) and the Hydroelectric plants (represented by IBEW Local 486). Significantly, IBEW Locals 326 and 486, cosignatories of the MOU along with Local 464, agreed in writing that USGen's benefits package was equivalent to NEP's. Respondent Exhibit 8 (providing that "[i]n place of the [NEP] benefits . . . and to satisfy the Company's obligation to provide a level

of benefits equivalent to the level of benefits set forth in the main table collective bargaining agreements, the Company's entire benefits package shall be implemented.").

As described above, USGen had had actuaries demonstrate that the value of its benefits was at least the equivalent of NEP's on three different levels: (1) looking at pension as part of an overall "basket of benefits" to be provided to employees; (2) looking at pension benefits alone; and (3) looking at the value of pension benefits to particular groups of employees whom the Union had identified as vulnerable. In all three cases, USGen's benefits were proven to be superior to NEP's. These findings appear in this record uncontested. Although the Union apparently hired an actuary, the record is devoid of any report or other conclusion he or she made that would contradict the findings of Hewitt Associates and Towers Perrin.

The Hewitt actuary, Bob Vogrich, testified at trial and described his credentials and was acknowledged as an expert by everyone in the room. Vogrich's two areas of expertise are both directly relevant here: he works as an enrolled actuary for pension plans, and he measures the value of benefit plans.[8] Vogrich testified that the value of employee benefits can be measured by "reasonable actuarial principles." In the early 1970s, Hewitt developed a method known as "Benefit Index" which it has used over the past 30 years to measure and compare the value of employee benefits.

Vogrich used the reasonable actuarial principles in the benefit index to determine whether USGen's benefit plans, and in particular its retirement plans, provided employees with at least an equivalent level of benefits as NEP's plans. Vogrich's written report explains the process used and conclusions reached. The model, techniques and methodologies used to compare USGen's benefits with NEP's benefits were those used by Hewitt in all other aspects of its Benefit Index work. As detailed above, Vogrich concluded that USGen's retirement benefits were superior in value to NEP's, whether considered as part of the overall basket of employee benefits offered by each company, or considered alone. At trial, Vogrich confirmed that in his expert opinion, USGen's benefits—both overall and specifically for retirement income—were of greater value than NEP provided.[9]

Vogrich testified in detail about the similarities and differences between NEP's and USGen's retirement plans. Like NEP, USGen had two components to its pension plan. Like NEP's final average pay pension plan, the first component of USGen's plan (its money purchase pension plan) was entirely employer-funded at a set level. And like NEP, USGen's other pension plan component was a 401(k) plan funded through employee contributions, with an employer match. Moreover, employees who may have been attracted to the relative safety of NEP's defined benefit plan could choose conservative investment options in USGen's defined contribution plans to achieve fixed, "guaranteed" returns. Among the investment options is a "Guaranteed Income Fund" from Cigna. Both NEP plans and both USGen plans are covered by ERISA. Defined benefit plans and defined contribution plans each have aspects employees would find advantageous.

Because the trial in this case occurred after the red book expired (at which time USGen reached an agreement with the Union), Vogrich was able to perform a retrospective analysis of how the Brayton employees fared under USGen's retirement plans during the relevant time period. Vogrich produced a chart showing his findings. Even having made a generous assumption that in all likelihood inflated the value of NEP's benefit, Vogrich concluded that the retirement plans implemented by USGen worked massively in the employees' favor as compared to USGen's replicating NEP's defined benefit plan. Compared to 12 employees who, combined, would have had a $5268 greater value under NEP's plans, there were 142 employees who were a total of $229,785 better off with USGen. The net effect was that the bargaining unit received $224,516 more in retirement benefit value from USGen's plans in the 9-month period until the red book expired, or an average of $1458 per employee.

The APA/MOU gave USGen one alternative to implementing its existing retirement plan: it could have created a new plan. ("[T]he new owner shall have the right . . . to either establish its own benefit plans or utilize its existing benefit plans"). In substance, the General Counsel argues that this was USGen's *only* option (to create a new plan), and furthermore, that such newly established plan needed to be a mirror of NEP's defined benefit plan. There are several defects in this theory, in addition to the most basic one, that it is not what the plain language of the MOU says, or what Local 464 said during negotiations that language meant. First, from an actuarial standpoint, the concept of an "equivalent level of benefits" would be meaningless if the contract required a mirror plan. A mirror plan would require the *exact* benefits be paid, eliminating the flexibility inherent in the concept of equivalence. Second, because of the small accruals employees would have seen under a mirror plan between September 1998 and May 1999, USGen legally would have been permitted to cash employees out in a lump sum, eliminating the monthly annuity payment that is the core of a defined benefit plan. Third, under the circumstances here, the administrative fees and other costs of establishing a defined benefit plan would have been prohibitive. Fourth, there would be a legal problem: the IRS requires that pension plans be established with the intent that they be permanent, not temporary.

b. Work rules

Because USGen's bargaining with Local 464 over new local working conditions did not result in an agreement, the Company did what the APA/MOU said it must: it unilaterally implemented work rules, it notified Local 464 what they were, and it commenced post-closing bargaining.

Although in the absence of an agreement USGen was free to revert to its originally proposed work rules, it did not do so. Instead, what USGen implemented reflected all the bargaining that had transpired between May 20 and August 26. In particu-

[8] In fact, before being engaged by USGen to measure the value of its benefits relative to NEP's, Vogrich did similar work for NEP.

[9] In fact, the overall benefit package USGen implemented at closing was even better than the package Vogrich had analyzed, because USGen supplemented a variety of non-retirement benefits based upon its pre-closing negotiations with the other former NEP unions.

lar, work rule 1 was as the Union proposed it on August 11 with the slight modifications the parties negotiated—not the original work rule 1 the Company had proposed in May. After closing, the parties continued bargaining over local work rules. The parties met on September 17, 1998, at which time the Union proposed a management rights oriented work rule. The parties met on October 21, 1998. The parties reached agreement on a new work rule at their December 15, 1998 meeting. When the parties met on January 11, 1999, the Union complained that the so-called management rights clause (which the Union had written and the Company had implemented) allowed USGen to change the main table agreement. The Company denied that the clause had such an effect, and offered to change it so that the point was clear. Specifically, the Company offered to add the introductory clause from its originally proposed work rule 1—"Except as limited by express provision of the collective bargaining agreement"—but the Union was not satisfied. The parties' last two meetings to discuss work rules occurred on January 25 and February 10, 1999, after which the parties began negotiating a successor contract.

The record is devoid of evidence that USGen has relied on its implemented work rule 1 even a single time since it has owned Brayton, let alone that it did so in a way that was inconsistent with the red book or was harmful to any unit member.

8. Local 464's objections to USGen's implementation

In the 2 days following the closing on September 1, 1998, Local 464 issued three letters objecting to USGen's implementation of terms and conditions of employment. These letters were drafted by the Union's attorney. They are the only letters whereby the Union objected to USGen's implemented work rules and benefits.

Consistent with its position throughout the preclosing negotiations, Local 464 never protested USGen's implemented retirement plans. To the contrary, the Union's letter protesting USGen's benefits implementation confirmed the Company's right to implement its retirement plans. Indeed, again consistent with its preclosing bargaining posture, the Union protested the Company's implementation of certain other benefits (e.g., holidays, vacations) by contrasting them with the implementation of medical and retirement benefits, which the Union acknowledged was within the Company's rights. The Union wrote:

> The "benefit package" described in your letter contains a number of unilaterally implemented provider-based employee benefit plans related to medical, hospitalization and retirement matters. Your letter also lists a number of unilateral changes USGen is making in specific contract entitlements that are neither ERISA-regulated nor provider-based benefits. . . . In meetings with the Union, you were repeatedly told that the parties had agreed that NEES' welfare benefit and pension benefit plans, and only those plans, were the employee benefit plans subject to that [equivalent level of benefits] provision. . . . The Union demands that U.S. Generating Company immediately cease implementation of any component of the "benefit package" that is *not* a benefit plan under Article IV of the MOU.[fn 1] . . . [fn 1] ERISA Section 3(3) confirms that the benefit plans referred to in Article IV of the MOU are NEES' employee welfare benefit plans and employee pension benefit plans and not any program or fringe benefit arrangement. (emphasis in original)

9. Arbitration against NEP

On September 4, 1998, Local 464 filed a grievance against NEP asserting that NEP violated the MOU by failing to ensure that USGen assume the red book at the time of its purchase of Brayton on September 1, 1998. The Union asserted that "[p]resale discussions with USGen made clear to the Union" that USGen would not assume the main table agreement, and that NEP did nothing to prevent it. When the case proceeded to arbitration, the Union submitted a brief (R. Exh. 4), which contained the following:

- A statement that under NEP's final proposal for the MOU (which was accepted by the Union) "benefit equivalence would be determined by the Company [NEP] and the new owner [USGen]."
- A statement that "benefit plans and providers would be exempt from the new owner's contract's assumption."
- A statement that "the Unions had no reason to okay exempting employee benefit programs from the contract's assumption unless NEP/NEES remained responsible to ensure equivalence after the sale."
- A statement that because NEP declined to require USGen to assume the MOU, the MOU remains a contract between the Company (NEP) and the Unions.
- Citation to a federal court case, *Glass Molders Int'l Union v. Owens-Illinois, Inc.*, 758 F. Supp. 962 (D.N.J. 1991), for the proposition that where a seller and the union are the only signatories to the contract, "they could not purport to impose liability on a nonsignatory third party," *i.e.*, the buyer.
- A recognition that the MOU's obligation ran only until May 20, 1999, the date the red book expired.

The Union filed no grievance, arbitration or any other kind of contract-based claim against USGen concerning either the work rules or benefits implementation.

10. New agreement

Local 464 and USGen agreed to a 30-month collective-bargaining agreement effective May 21, 1999.[10] The parties agreed that although Local 464 could continue challenging the work rules, benefits, and other terms and conditions of employment in effect between September 1, 1998, and May 20, 1999, all work rules, benefits and other terms and conditions of employment are fully settled and resolved on a going-forward basis as of May 21, 1999. In particular, the parties reached agreement on work rule 1, with a slight modification and on retirement benefits.

C. Discussion and Conclusions

In drawing its workforce entirely from NEP, USGen became a successor to NEP at Brayton. Consequently, it was obliged to recognize the Union, but under the Supreme Court's decision in

[10] By this time, USGen's name had been changed to PG&E National Energy Group.

Burns, USGen—absent waiving its rights—could establish the initial terms and conditions of employment. *NLRB v. Burns International Security Services*, 406 U.S. 272, 294–295 (1972). *Burns* specifically accords the successor employer the right to reject the predecessor's collective-bargaining agreement. As *Burns* held, because the successor has no prior agreement with the Union, it cannot violate 8(d) by implementing terms and conditions of employment that vary from the predecessor's collective-bargaining agreement.

In the instant case, USGen did modify its rights under *Burns* by agreeing to adhere to the terms of the MOU. As pertinent, the MOU required USGen to adhere to certain of the red book provisions, but not to local agreements or local work rules. It also gave USGen the right to substitute certain benefits, including its retirement plan, so long as the benefits are equivalent to the level of benefits provided by NEP. As of the date of closing, September l, 1998, USGen recognized the Union, adopted those portions of the red book required by the MOU, and implemented with prior notice, work rules and what it asserts correctly is a retirement plan with benefits equivalent to those contained in NEP's retirement plan. Prior to September 1, 1998, Respondent had no relationship to the Union and was not a party to the collective-bargaining agreement (the red book) between NEP and the Union. It only adopted the red book to the extent required by the MOU, and the MOU, as does *Burns*, allowed USGen to establish at closing local work rules and a retirement plan with benefits equivalent to those in NEP's plan.

General Counsel argues that a defined contribution plan (provided by USGen) and a defined benefit plan (provided by NEP) are so fundementally different that a defined contribution plan cannot be equivalent to a defined benefit plan. Unfortunately for this position, USGen presented credible expert testimony and actuarial evidence that convinces me the USGen's defined contribution plan not only provides equivalent benefits to those in NEP's defined benefit plan, it provides greater benefits. As USGen's defined contribution plan does provide at least equivalent benefits, I find that USGen has acted lawfully and not in violation of the Act. If the framers of the MOU had wanted the successor to provide a "mirror" plan, or another defined benefit plan, they could have required that by so wording the MOU. They did not, opting instead to use the word equivalent. The fact that the General Counsel believes to the contrary does not serve to negate the expert actuarial evidence adduced by USGen.

Under *Burns*, and the MOU, USGen was free to implement local work rules so long as they did not conflict with a provision of the red book that USGen was obligated by the APA to follow. General Counsel asserts that USGen's implementation of its work rule in question was an impermissible modification of the red book. The work rule implemented states as follows:

> The Union recognizes the right and power of the Company to select and hire all employees; to promote employees; to determine the necessity for filling a vacancy; to transfer employees from one position to another; to suspend, discipline, demote or discharge employees; to assign, supervise, or direct all working forces and to maintain discipline and efficiency among them; to determine overall staffing levels, shift complements and classification complements; to lay off employees and to stagger employment when required because of lack of work or curtailment of work or other legitimate reasons; and generally to control and supervise the Company's operations and to exercise the other customary functions of management in carrying on its business without hindrance or interference by the Union or by employees.

I cannot find that Respondent violated the Act by its implementation of the work rule in question. It was implemented at the same instant that USGen adopted the portions of the red book it was required to adopt by the APA and MOU and was part of the intitial terms and conditions of employment. The implementation of its own work rules was contemplated by the MOU. The implementation of the work rules was not shown to have modified the portions of the red book USGen was bound to adopt by the MOU. Respondent after the initial implementation of its entire package of initial terms and conditions did not modify any of the terms of the red book it was bound by the MOU to adhere to. USGen had under Burns and the MOU the legal right to establish work rules at the time of closing. It has not been shown to have waived those rights. I cannot find that the work rule implemented conflicts with the red book and do find that USGen acted within the legal framework allowed by Burns and the MOU. The cases relied on to show the opposite involve a successor adopting an existing collective bargaining agreement and thereafter attempting to modify the agreement without first giving the union the opportunity to bargain over the modification. That was not the case here. Well before closing, the Union was on notice regarding the inititial terms and conditions of employment including the work rule in question and the retirement plan implemented.

CONCLUSIONS OF LAW

1. The Respondent, U. S. Generating Company, Boston, Massachusetts, or as it is now known, PG&E National Energy Group, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Local 464, Utility Workers Union of America, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent did not violate the Act as alleged in the Complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[11]

ORDER

The complaint is dismissed.

Dated, Washington, D.C. August 30, 2001

[11] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.